COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own motion pursuant to G.L. c. 159, §§ 12 and 16, into Verizon New England Inc., d/b/a Verizon Massachusetts' provision of Special Access Services.	)	D.T.E. 01-34

OPPOSITION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. TO VERIZON MASSACHUSETTS' MOTION FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION

AT&T Communications of New England, Inc. ("AT&T") opposes Verizon Massachusetts' ("Verizon") request that the Department reconsider or clarify its August 9, 2001 Order on AT&T Motion to Expand ("*Order*"). The *Order* requires Verizon to supplement its May 24, 2001 Special Access Report with data on interstate special access services. In its Motion For Partial Reconsideration and/or Clarification ("*Verizon Motion*"), Verizon asks the Department to modify its *Order* so that the supplemental interstate data "would not be made part of the record evidence in this case or subject to investigation, e.g., discovery, testimony, briefing, etc." *Verizon Motion,* at 1. Verizon asks that this interstate data not be made part of the record in the proceeding even though the Department will rely on the data to "inform" its decision on the reasonableness of Verizon's intrastate special access services. *Id*.

Verizon's motion fails, first, because it clearly does not meet the Department's standard of review for reconsideration and clarification of decisions. Second, Verizon's motion fails because the Department regularly places on the record, for "informational purposes," facts over which it does not have jurisdiction to grant certain remedies where those facts are nevertheless useful or relevant to matters over which it does have jurisdiction.

Argument.

I. VERIZON FAILS TO MEET THE STANDARD FOR RECONSIDERATION.

Verizon seeks to bring its motion within the standard for reconsideration by arguing that the Department's decision was a result of mistake or inadvertence. According to Verizon, the Department was mistaken in believing that a larger sample of special access provisioning is necessary in order to draw conclusions about Verizon's intrastate special access provisioning. *Verizon Motion*, at 4. Verizon contends that its

> May 24th report is not a sample, but rather reflects Verizon's entire customer base of intrastate special access circuits in Massachusetts. Therefore, through mistake or inadvertence, the Department concluded that interstate data was [*sic*] needed "in order to receive a statistically valid sample."

Id. (emphasis in original; citations omitted). Verizon's argument is specious as a matter of statistics and inconsistent with the position it has taken on the use of statistics in evaluating its performance both in the *Consolidated Arbitrations* dockets and under the Performance Assurance Plan approved by the Department in D.T.E. 99-271.

The purpose of reporting Verizon's performance is not to produce a bare number regarding Verizon's performance. Rather, the purpose of calculating and reporting numbers regarding Verizon's performance is to draw conclusions about the adequacy and fairness of Verizon's provisioning process. For this, it is necessary to make inferences from available data. The issue the Department, thus, considered was whether the number of observations in data taken only from intraLATA special access provisioning would be sufficient to draw statistically valid conclusions about the underlying provisioning process. In this sense, the number of provisioning transactions in any given month is simply a "sample" of observations reflecting Verizon's underlying provisioning process. Verizon's percentage of missed appointments varies from month to month. It is necessary to determine whether a calculation using a particular

month's data reflects a systematic characteristic of the underlying provisioning process, or is merely a statistical fluke.

Indeed, Verizon argued precisely this point in support of its proposal to use statistical testing to evaluate its performance for the purpose of liquidated damages in the *Consolidated Arbitrations* dockets. In D.P.U./D.T.E. 96-73, 96-75, 96-80/81, 96-83, 96-94-Phase 3-E, Verizon (then Bell Atlantic) stated that the use of a statistical approach was required to avoid unfair penalization of the company "for statistical aberrations that have no statistical significance." D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 3-E (September 25, 1998) at 11. Verizon stated that, "absent a statistical analysis, even a random deviation that shows worse performance would cause a payment by Verizon." *Id*. Thus, Verizon moved to include a statistical test of parity to avoid penalties for random variations in month-to-month data.[1] Moreover, as the Department is well aware, Verizon proposed, and the Department approved, a Performance Assurance Plan in D.T.E. 99-271 that includes statistical testing of Verizon's performance in each month, even though the data in each month's "sample" reflect all transactions for that month. *See* Performance Assurance Plan, Verizon Massachusetts, D.T.E. 99-271 (January 30, 2001), at § I. A. 2. (c).

The Department's ability to reach statistically valid conclusions from extremely small sample sizes is severely compromised. As previously noted by the Department, Verizon provisions less than 1% of special access services under state tariff. *Order*, at 11. Thus, only a statistical study including both the intrastate and interstate data will provide the Department with

[1] The Department ultimately denied Verizon's request on procedural grounds because "there was an insufficient record in the earlier part of this proceeding to support the inclusion of such a statistical method in the compliance filing."

an accurate picture of the underlying process that Verizon uses to provision both intrastate and interstate special access services.

II. THE DEPARTMENT ROUTINELY ENTERS INTO EVIDENCE FACTS RELATED TO MATTERS OVER WHICH IT HAS NO AUTHORITY TO GRANT RELIEF WHEN SUCH FACTS ARE RELEVANT TO MATTERS WITHIN ITS JURISDICTION.

The Department regularly enters into evidence facts related to matters over which it has no authority to grant relief when such facts are relevant to matters within its jurisdiction. For example, when the Department was asked to approve gas supply contracts for more than one year, pursuant to G.L. c. 164, § 94A, it routinely took into evidence other gas contracts over which it did not have approval authority in order to consider how the contract subject to its jurisdiction fit into the gas company's overall gas supply plan. *See, e.g., Petition of Commonwealth Gas Company*, D.P.U. 93-222 (March 30, 1994). Similarly, the Department has taken into evidence gas company Requests for Proposal ("RFP") seeking offers to supply gas, even though the gas company was not seeking approval of the RFP itself. *See, e.g., Petition of Boston Gas Company, Colonial Gas Company and Essex Gas Company*, D.T.E. 99-76 (October 18, 1999). Indeed, almost all evidence that the Department takes will relate to matters not under its jurisdiction in addition to those that are under its jurisdiction. For example, in utility rate proceedings, labor rates negotiated under collective bargaining decisions inform the Department's decision establishing telephone, gas or electric rates and are entered into the record despite the Department's obvious lack of jurisdiction over the establishment of the labor rates themselves.

The fact that the Department takes into evidence information over which it does not have authority to grant certain relief does not mean the Department will lose sight of the issues to be adjudicated in the proceeding, in this case, Verizon's provisioning of intrastate special access

services. The present situation is not unlike the many cases mentioned above in which the Department took into evidence and carefully reviewed gas supply contracts over which it had no jurisdiction so that the Department could render an informed decision regarding gas supply contracts over which it did have authority to grant relief. Placement of non-jurisdictional contracts in the record did not – as Verizon fears – "undoubtedly shift the focus of the proceeding," *Verizon Motion*, at 4, away from the jurisdictional contracts at issue. In those cases, the Department did not purport to approve or reject the non-jurisdictional contracts; rather, it appropriately used the non-jurisdictional contract information to render a decision on the jurisdictional contract before it. Similarly, in the present case, the Department has made clear that it will not purport to grant relief with respect to Verizon's interstate performance. The Department stated that it "will not apply any findings or potential remedies to interstate services." *Order*, at 11, 12. Any discovery, testimony, or briefing on facts that include interstate data will inform the Department's investigation of the provisioning process that Verizon uses to provide intrastate special access services, and any relief granted will, according to the Department, only apply to intrastate performance.

Conclusion.

For the reasons stated above, Verizon's motion for partial reconsideration and/or clarification should be denied.

Respectfully submitted,

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

_____

Robert Aurigema, Senior Attorney
32 Avenue of the Americas
Room 2700
New York, NY 10013
(212) 387-5617

Jeffrey F. Jones, Esq.
Kenneth W. Salinger, Esq.
Jay E. Gruber, Esq.
Katherine A. Davenport, Esq.
Palmer & Dodge LLP
One Beacon Street
Boston, MA 02108
(617) 573-0100

September 28, 2001